No. 84-833

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEAN DREDGING CORPORATION,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of
Civil Appeals of Alabama and the
Supreme Court of the State of Alabama

MOTION TO DISMISS

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MOTION TO DISMISS

May it please the Court:

Appellee, State of Alabama, Department of Revenue, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves that the appeal in this cause as filed by the Appellant be dismissed upon the following grounds:

I. LACK OF JURISDICTION

II. LACK OF A SUBSTANTIAL FEDERAL QUESTION

III. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

According to the Jurisdictional Statement filed by Appellant, jurisdiction is claimed based upon the

provisions of 28 U.S.C. §1257(2). In addition, Appellant claims the case is eligible for a grant of certiorari under 28 U.S.C. §1257(3). Both sections require that there be "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Jurisdictional Statement correctly sets forth the Alabama use tax involved. Section 40-23-61 of the *Code of Alabama 1975*, as amended, provides:

> (a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property ... at the rate of 4% of the sales price of such property,...

Section 40-23-62 of the *Code of Alabama 1975*, as amended, provides:

> The stroage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> (14) The use, storage or consumption of the materials, equipment and machinery *which enter into and become a component part of* ships, vessels or *barges* of more than 50 tons burden constructed or built within the state. (Emphasis supplied.)

Appellant erroneously calls to the attention of the Court that portion of the above exemption — "constructed or built within the State" — claiming that the highest court of the State of Alabama failed to declare the exemption provision of the statute unconstitutional due to the interstate commerce clause. However, such issue was pretermitted by both the trial court and appellate courts of Alabama by a determination that Appellant did not qualify for the exemption based upon the above-emphasized portion of the exemption. Appellant would not qualify for the use tax exemption regardless of whether the barges in question were constructed or built either within or without the State of Alabama. Additionally, even assuming that the exemption would be sticken as unconstitutional, it is Appellant that is claiming exemption thereunder. A ruling that the exemption is unconstitutional would not therefore change the Alabama courts rulings that the assessment of use tax against appellant was correct. The judgment rested on an adequate non-federal basis and no substantial federal question was involved.

CONCLUSION

In conclusion, the Appellant lacks standing to challenge the constitutionality of the above-referenced use tax exemption. The opinion of the Court of Civil Appeals of Alabama is clear that it did not rule upon, and it was not necessary to consider, the validity of the exemption on constitutional grounds. Therefore, the validity of the statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States was not drawn in question. In view of the foregoing grounds presented herein, Appellee, State of Alabama, requests that this appeal be dismissed for lack of jurisdiction, or in the alternative, if the appeal should be considered a petition for certiorari, then the petition for certiorari should be denied.

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Appellant

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PROOF OF SERVICE

I, Charles E. Crumbley, a member of the Bar of the Supreme Court of the United States, and attorney of record for Appellee, State of Alabama, hereby certify that on the 18th day of January, 1985, I served copies of the foregoing Motion to Dismiss on all parties required to be served by depositing a copy of same in the United States Mail, with first-class postage prepaid, addressed to:

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